

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

INDIANAPOLIS

OFFICE MEMORANDUM

Date: March 4, 2010

To: T. W. Easterly

From: D. R. Joest

Subject: **Use of Derived Criteria as Basis for Establishment of Total Maximum Daily Loads (“TMDLs”) and Listing of Impaired Waters Under CWA Section 303(d)**

This memo summarizes the advice that Kari Evans and I gave Martha at our meeting on February 8, 2010, concerning the use of water quality criteria derived under 327 IAC 2-1-8.1 through -8.9¹ as the basis for listing waters as impaired under CWA section 303(d) and to establish TMDLs for impaired waters. We advised that there would be a due process issue if these derived criteria were used to take actions having regulatory effect, since the derived criteria are not established through a process providing potentially affected parties sufficient notice and the opportunity to comment on and appeal the proposed criteria prior to their application.

The minimum water quality standards set forth in 327 IAC 2-1-6 are established by rule. Whatever the technical process used to determine the values used, the proposed standards went through the full rulemaking process prescribed by IC 13-14-9 and IC 4-22-2, including first and second notices of proposed rulemaking, preliminary adoption by the Water Pollution Control Board, and review by the Attorney General. Derived criteria do not undergo this public participation process unless and until they are incorporated into the minimum water quality standards in 327 IAC 2-1-6.²

It is a basic principle of administrative law that persons affected by proposed regulatory requirements must be given notice of and an opportunity to comment on the proposed requirements before becoming subject to them. The problem with using derived criteria for regulatory purposes such as establishing TMDLs is that by the time the TMDLs

¹ These criteria are commonly referred to as “Tier 1” and “Tier 2” criteria depending on the quality of the data used to derive them, but that terminology is not used in the general water quality rules (as opposed to the GLI rules) and the distinction between Tier 1 and Tier 2 criteria is not relevant to this discussion, which will simply refer to “derived criteria.”

² As many criteria have been, *see* 327 IAC 2-1-6(1)(E), -6(2)(B).

would be applied to an actual NPDES permittee, the derived criteria would already be in place without the permittee having any prior notice of or opportunity to comment on the criteria. Therefore we have recommended that derived criteria not be used to establish TMDLs³ until the derived criteria have been incorporated into the general water quality standards in 327 IAC 2-1-6 through rulemaking.

Please feel free to contact me if you have any questions or wish to discuss further.

Cc: M. Clark Mettler
K. A. Evans (IDNR)
B. Pigott

³ Nor to list waters as impaired under CWA § 303(d), since this action triggers the requirement to develop TMDLs for the waters listed. CWA § 303(d)(2).